

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States  
Department of Housing and Urban  
Development, on behalf of  
Warren Sanford and The Estate of  
Carlos Guevara,

Charging Party,

v.

The Elroy R. and Dorothy Burns Trust, et al.,

Respondents.

HUDALJ 09-92-1622-1  
Decided: June 17, 1994

Clifford B. Malone, Jr., Esq.  
For the Respondents

M. Hope Young, Esq.  
R. Faye Austin, Esq.  
For the Charging Party

Before: William C. Cregar  
Administrative Law Judge

**INITIAL DECISION AND ORDER**

**Statement of the Case**

This matter arose as a result of complaints filed by Warren Sanford and Carlos Guevara ("Complainants"), alleging discrimination based on handicap in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On October 13, 1993, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban

Development ("HUD" or "the Charging Party") issued a charge against The Elroy R. and Dorothy Burns Trust, and George Maynard ("Respondents"), alleging that they had engaged in discriminatory practices in violation of 42 U.S.C. § 3604 (f). Specifically, HUD alleges that Respondents evicted Complainants because Mr. Guevara (now deceased) had Acquired Immune Deficiency Syndrome ("AIDS").

On January 24, 1994, the Charging Party moved to amend the charge to add Elroy R. and Dorothy Burns, individually, as Respondents.<sup>1</sup> Respondents did not object and I granted the Motion. Tr. 1, p. 6.<sup>2</sup> A hearing was held in San Francisco, California on February 1-3, 1994.<sup>3</sup> The parties' post-hearing briefs were filed timely; the last brief was received on April 18, 1994. Accordingly, this case is ripe for decision.

### **Findings of Fact**

1. The Caprice Apartments ("the Caprice") are located at 1725 Lacassie Avenue, Walnut Creek, California. This location is in a "manicured mature neighborhood," one block from a shopping area, the BART (San Francisco's subway system), and various bus routes. Tr. 1, p. 207. The complex contains 14 units and an outdoor courtyard with a heated pool. All of the apartments face the courtyard and pool. Tr. 1, pp. 205-09; Tr. 3, pp. 707-09, 752.

2. Complainant Warren Sanford resided at the Caprice in Unit 4, a one-bedroom apartment, from September 1989 until June 1992. Tr. 1, pp. 44-45; R. Ex. A. His monthly rent was \$575. Tr. 1, p. 192. Complainant Carlos Guevara moved in with Mr. Sanford around November of 1989, and was formally added to Mr. Sanford's lease in July of 1991. Complainants shared the rent and utilities for the periods when they resided together. Tr. 1, pp. 48, 217-18; Tr. 2, p. 229; R. Exs. A and B; C. P. Ex. 12.

3. Complainants had a homosexual relationship which Mr. Sanford described as "the closest thing we could come to as a marriage." Tr. 1, p. 45. Both were open about their relationship and did not hesitate to display their affection at the apartment complex. Tr. 1, p. 46.

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<sup>1</sup>Because Mr. Maynard died soon before the filing of the charge, HUD moved to amend the charge to reflect Mr. Maynard's death. Respondents did not object. However, because HUD was unable to locate and serve a personal representative of his estate, the estate is not a party to this proceeding.

<sup>2</sup>The following reference abbreviations are used in this decision: "Tr. 1," "Tr. 2," and "Tr. 3," followed by a page number for Transcript Volumes I, II, and III; "C. P. Ex." for the Charging Party's Exhibit; and "R. Ex." for Respondents' Exhibit.

<sup>3</sup>Michelle Giere, the sister of Complainant Carlos Guevara, was present at the hearing. Subsequent to the hearing she was appointed Special Administrator of Mr. Guevara's estate for the purpose of representing Mr. Guevara in this proceeding. She was also granted the authority to receive and distribute any damages awarded. Secretary's Post-Hearing Brief (Apr. 15, 1994) at App. I ("Charging Party's Brief").

4. Mr. Sanford is a drapery specialist. He has also been a disc jockey and worked part-time as a program director, booking entertainment at a night club. Tr. 1, pp. 43-44. Mr. Guevara was a claims examiner for the State Compensation Insurance Fund. R. Ex. B. He held a business degree from the University of California at Berkeley. He handled most of the couples' business matters. Tr. 1, pp. 47-48.

5. Respondents Elroy and Dorothy Burns, a married couple, purchased the Caprice as joint tenants in January 1968. In May of 1990, they formed the Elroy R. and Dorothy Burns Trust which currently owns the property. The trustee is the First Interstate Bank of Nevada, located in Reno, Nevada. Elroy and Dorothy Burns are the beneficiaries of the trust. Tr. 3, pp. 752-53.

6. The Burnses managed and lived at the Caprice from 1968 until 1976. They have owned other rental property, including a 19 unit apartment building, an eight unit complex, and two cottages. They purchased their first building in 1959. Tr. 3, p. 765; C. P. Exs. 9, p. 2; 10, pp. 2-3. Mr. Burns is retired from the San Francisco Police Department, where he worked for 25 years. Tr. 3, pp. 752-53.

7. Mr. Burns was a member of the local apartment owners association from 1968 until 1981. He has attended seminars and meetings on housing discrimination and is aware of the prohibition in the Act against discrimination on the basis of handicap. Mr. Burns provides a weeklong training session for his managers and instructs them not to discriminate on the basis of handicap or other protected classes. Before hiring managers, he obtains credit checks and verifies employment and other references. He provides his managers with a manual of rules that includes managers' responsibilities, instructions on completing forms, and policies of the individual complex. Mr. Burns uses forms, such as rental agreements and eviction notices, that have been approved by the State Attorney General's Office. Tr. 3, pp. 764, 771-75.

8. Mr. Burns hired George Maynard as resident manager at the Caprice in January 1990. Mr. Maynard was employed in that capacity until his death from cancer on September 27, 1993, at the age of 74. Tr. 1, pp. 45, 103, 112; Tr. 3, pp. 755, 761, 779. He collected rents, showed and rented apartments, and was responsible for maintaining the complex and grounds. He was authorized to make repairs costing less than \$100. Any amount over that required Mr. Burns' approval. Mr. Maynard had authority to serve three-day eviction notices for nonpayment of rent without Mr. Burns' approval. However, his approval was required before Mr. Maynard served 30-day eviction notices. Tr. 3, pp. 762-64. Although there was no written lease provision requiring prior notification, it was Mr. Burns' practice to provide two written notices to a tenant prior to eviction. Tr. 1, p. 106; Tr. 3, pp. 826-27.

9. Mr. Burns and Mr. Maynard discussed repairs and problems at the complex by telephone four to five times monthly. Tr. 3, pp. 766-67, 782. Mr. Burns visited the

complex once a month to observe the physical condition of the complex and to collect rent checks and any relevant documents from Mr. Maynard. Tr. 3, p. 839. Mr. Burns would deliver the documents to his wife and she would perform the accounting and bookkeeping tasks at their residence. The Burnses normally had no contact with the tenants. Tr. 3, pp. 762, 779, 805. Mr. Burns thought that Mr. Maynard was performing his duties well because he collected rents on time, showed and rented vacant apartments, and adequately maintained the building and its grounds. Tr. 3, pp. 759, 789, 807.

10. Rules and regulations governing tenancy at the Caprice are distributed and publicized to all tenants. These rules prohibit: overnight guests without the owner's permission; disturbing noises in the tenants' unit; "lounging, visiting, or loud talking" in the common areas "that may be disturbing to other residents. . . between the hours of 10 p.m. and 6 a.m.;" use of the pool after 10 p.m.; jumping in the pool; radios, record players, or other musical instruments around the pool without the consent of management; and alcoholic beverages around the pool. R. Ex. A, pp. 3-7; Tr. 2, pp. 234-35, 245-46. In addition, all "musical instruments, television sets, stereos, radios, etc., are to be played at a volume which will not disturb other persons." R. Ex. A, pp. 3-7.

11. Because the apartments face and surround the courtyard and pool, the courtyard was used by the tenants for various social activities. Some of the tenants, including Complainants, congregated around the swimming pool for impromptu or planned parties. Tr. 1, pp. 60-65, 209; Tr. 3, pp. 659-60. Attendance at pool parties averaged between 12 to 15 tenants and usually included Mr. Maynard. The parties sometimes ended as late as 1:30 a.m. Mr. Maynard along with other partygoers drank alcoholic beverages while at the pool parties. Tr. 1, p. 62; Tr. 2, pp. 332, 365, 520-21; Tr. 3, pp. 660-01, 663. During the day, Complainants and tenants from at least five other units would occasionally play music from their apartments with their doors and/or windows open so that they could listen to the music while at the pool. Tr. 2, pp. 333, 458; Tr. 3, pp. 617-19, 662-63. Other tenants would listen to music from radios or "boom boxes" located in the pool area. One tenant played his guitar at the pool. Tr. 2, pp. 296, 332-33.

12. Complainants found the atmosphere at the Caprice Apartments to be very social, likening the other tenants to an extended family. Mr. Sanford described his neighbors as "caring and kind." Complainants both hosted and attended dinner parties with other tenants, which usually ended between 10 p.m. and 11 p.m. Tr. 1, pp. 60-65, 209; Tr. 3, pp. 659-60.

13. Messrs. Burns and Maynard knew that Complainants were a homosexual couple. Tr. 1, pp. 99, 133; Tr. 2, p. 236; Tr. 3, pp. 787-88. Mr. Maynard made a number of comments to other tenants regarding Complainants' sexual orientation. Thus, he cautioned one tenant to "steer clear" of Complainants because they were homosexual. Tr. 2, pp. 335-36. He informed a newly arrived tenant that Complainants were homosexual and told his wife that Complainants "were going to try and take [her] husband away from [her]." Tr. 2, pp. 448, 480, 498. Finally, Mr. Maynard would ask

Mr. Sanford when he was going to get a girlfriend. Tr. 3, pp. 623, 682. Mr. Burns learned about Complainants' sexual orientation from Mr. Maynard.<sup>4</sup> He described Complainants as "high profile people [who] had lots of friends." Tr. 3, p. 794.

14. Messrs. Maynard and Guevara enjoyed an amicable relationship. They spoke on the average of twice a week. Mr. Maynard would go to Complainants' apartment to converse with Mr. Guevara, or they would see each other at the pool. Tr. 1, pp. 72, 74, 99, 118; Tr. 2, pp. 236, 243-45. Messrs. Maynard and Sanford did not enjoy a similar relationship. Although there were no rules requiring recycling or prohibiting tenants with bleached hair from swimming, at various times Mr. Maynard accused Mr. Sanford of failing to recycle his garbage and complained to others of Mr. Sanford disturbing the PH balance of the pool by jumping and swimming in it with bleached hair.<sup>5</sup> Tr. 2, pp. 266-67, 456-57, 521-22. In addition, Mr. Maynard had once chastised Mr. Sanford for backing into a parking space, and he complained to Mr. Sanford about an overnight guest who had stayed approximately a week without management's permission.<sup>6</sup> Finally, Mr. Maynard would occasionally tell Mr. Sanford to lower the volume of music during Complainants' dinner parties and would complain to others about him listening to music by the pool. Tr. 1, pp. 66-67, 97, 116; Tr. 2, pp. 234-35, 240-41, 245-46, 296, 334, 392-93.

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<sup>4</sup>When first asked about Complainants' homosexuality, Mr. Burns testified that he "assumed they were, they were living together." However, upon further questioning, he testified that Mr. Maynard had informed him about Complainants' homosexuality. Tr. 3, pp. 787-88.

<sup>5</sup>Mr. Sanford had called local government or waste management officials to investigate whether recycling was mandatory and he was informed that it was a voluntary program. Tr. 2, pp. 266-67. Mr. Maynard did not chastise other tenants whom he observed jumping in the pool. Tr. 1, p. 68; Tr. 2, pp. 310, 330, 454-57, 521-22; Tr. 3, pp. 658, 678. Another tenant, Beth Lindberg, had bleached hair and she used the pool without reproach. Tr. 2, pp. 521-22.

<sup>6</sup>Complainant, however, told the guest to leave immediately after Mr. Maynard complained. Complainants had two other overnight guests for less than a week each. Mr. Maynard, however, was unaware of these visitors. Tr. 1, pp. 66-67.

15. Mr. Guevara was housebound because of his illness for approximately two to three weeks in March 1992. Around the beginning of April 1992, Complainants decided that Mr. Guevara needed medical attention because he developed breathing problems. At the hospital, Mr. Guevara was diagnosed with AIDS. He had lost 60 pounds over the six-month period preceding his hospitalization. According to Complainants' friend and neighbor, Eric Carroll, he looked emaciated. Tr. 1, pp. 71-72, 74-76; Tr. 3, pp. 632, 665. On or about April 22, 1992, Mr. Guevara was released from the hospital for a brief at-home visit. He arrived at the complex, pulling a portable oxygen tank on wheels. On the way to his apartment, Mr. Guevara stopped at the pool area to speak to a few friends. On this occasion, Mr. Maynard observed Mr. Guevara whom he later described

to the HUD investigator as looking "like death warmed over." Tr. 1, pp. 82-83, 220-21; C. P. 17, p. 8.<sup>7</sup>

16. After his initial hospitalization and diagnosis, Mr. Guevara planned to return to the Caprice and resume his normal routine to the maximum extent possible. Tr. 1, pp. 77, 145-48, 164; Tr. 3, pp. 682, 696-97.

17. Complainants' friends at the Caprice offered Mr. Sanford assistance in providing at-home care for Mr. Guevara. Joanne Burlison lived in the apartment directly above Complainants and worked across the street from the complex. She offered to bring Mr. Guevara lunch every weekday. In addition, she volunteered to shop for groceries for Complainants. Because of the location and flexibility of her job and the proximity of her apartment to Complainants', she stated that she "could be over there in a flash" if Mr. Guevara needed anything. Tr. 3, pp. 671-72. Another neighbor, Autumn Faircain, informed Ms. Burlison that she, too, would be willing to assist Complainants. Tr. 3, p. 672. Ms. Burlison's roommate, Eric Carroll, offered Complainants assistance. He was able to provide help because he worked out of his home. He stated that because of their many friends at the Caprice, "[t]here was always going to be someone there." Tr. 3, p. 635. Finally, because Mr. Sanford worked one block away from the Caprice, he would have been able to check on Mr. Guevara. Tr. 1, pp. 208-10.

18. In anticipation of Mr. Guevara's return home, in mid-April, Mr. Sanford redecorated their apartment. He framed and hung newspaper front pages that Complainants had collected. He replaced a light fixture and Complainants' dishes, glassware, and dining linens. He also replaced the worn dining room drapes with custom made mini-blinds and a valance. He installed a new miniblind in the bathroom and a pleated shade on the formerly bare kitchen window. The window treatments cost

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<sup>7</sup>Because Mr. Guevara never returned again to the Caprice, this at-home visit was the last time that Mr. Maynard saw Complainant. Therefore, I conclude that Mr. Maynard was describing Mr. Guevara's appearance as he observed him during this at-home visit at the end of April 1992.

Complainant a total of \$141.75. Tr. 1, pp. 77-82; C. P. Exs. 1E, 1F, and 5.<sup>8</sup>

19. On three separate occasions in April 1992, Mr. Maynard questioned

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<sup>8</sup>The photographs showing Mr. Sanford's improvements reveal that Complainants maintained their apartment. C. P. Exs. 1E and 1F. Ms. Burlison described their apartment as being in "perfect condition" because Complainants were "extremely clean" and "always kept very good care" of it. Tr. 3, p. 669.

Mr. Sanford concerning Mr. Guevara's whereabouts. Fearing that disclosure of the truth might subject them to eviction, Mr. Sanford replied on the first two of these occasions that Mr. Guevara was out of town. Tr. 1, pp. 83-88; Tr. 3, pp. 626-28. On the morning of April 30, 1992, Mr. Maynard rummaged through Complainants' garbage and discovered a note written on yellow paper indicating that Mr. Guevara was hospitalized with AIDS.<sup>9</sup> Tr. 2, pp. 312-14, 449-50, 466-68; C. P. Ex. 11. In the course of his rummaging he also found cans in Mr. Sanford's refuse. Later that afternoon he accosted Mr. Sanford at the front gate of the complex and accused him of not recycling. After reprimanding him for not recycling, Mr. Maynard again asked Mr. Sanford about Mr. Guevara's whereabouts. Mr. Sanford replied that he was in the hospital with pneumonia. Tr. 1, pp. 83-88; Tr. 2, pp. 312-14.

20. Complainants always paid their rent on time, on the first of each month. Tr. 1, p. 188. On May 1, 1992, Mr. Sanford went to Mr. Maynard's apartment to pay his rent. Mr. Burns was seated at Mr. Maynard's dining room table. After receiving Complainants' rent payment, Mr. Maynard handed Mr. Sanford an envelope. Mr. Sanford returned to his apartment, opened the envelope, and discovered a 30-day eviction notice. Mr. Sanford went back to Mr. Maynard's apartment and asked why Complainants were being evicted. Mr. Maynard replied, "No particular reason. We're thinking of doing some remodeling. We'd like to add a bedroom to your unit." Mr. Burns nodded in agreement.<sup>10</sup> Tr. 1, pp. 88-90.

21. Despite Mr. Burns' policy of providing two prior written warnings, Complainants had never been warned about or threatened with eviction. Tr. 2, pp. 289-90.

22. Mr. Sanford visited Mr. Guevara at the hospital on the evening of May 1st and informed him about the eviction notice. Mr. Guevara was incredulous, shocked, and very agitated. He questioned Mr. Sanford at length as to the reasons for the notice, and initially, he blamed Mr. Sanford for the eviction. However, Mr. Guevara subsequently attributed the notice to his illness. In any event, the eviction caused tension in Complainants' relationship because Mr. Guevara would direct his anger at his partner. Tr. 1, pp. 145-47, 153, 171, 173-75, 185-89.

23. Immediately after receiving the eviction notice Mr. Guevara's medical condition worsened. He required more oxygen, lost sleep, and became depressed. Despite his ill health, Mr. Guevara formulated a strategy to fight the eviction. He

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<sup>9</sup>Even though this document was not introduced into evidence and its specific contents are unknown, I base this conclusion on the testimony of Jose Avila and Paul Kearney. See *infra* pp. 13-14.

<sup>10</sup>Respondents admit that the stated reason for the eviction was false. When HUD counsel questioned Mr. Burns as to why Mr. Maynard provided Mr. Sanford with a sham basis for the eviction, Mr. Burns responded, "I don't know. Maybe a face saving. . . instead of insulting him. . . ." Tr. 3, p. 801.

composed letters for Mr. Sanford to type and send, told him which documents to request, and provided agency names for him to contact. Mr. Guevara's family attempted to alleviate his stress by reassuring him that they would provide housing for him. His family also denied his requests to speak to Mr. Maynard directly about the eviction for fear of the adverse affects on his health. Finally, Mr. Guevara was upset that his privacy had been violated by Mr. Maynard's search through his trash. Tr. 1, pp. 145-47, 153, 171, 173-75, 185-89; Tr. 3, pp. 682, 698-00, 705.

24. For months after the eviction, Mr. Sanford was also distraught. He cried and became depressed. Tr. 3, pp. 629-30, 667. He was concerned that he would not be able to find a home conducive to Mr. Guevara's convalescence because he knew that the hospital would not discharge him unless he had suitable living arrangements. Tr. 1, p. 220; Tr. 3, pp. 630, 667. He also felt that his privacy had been violated by Mr. Maynard's search through his garbage. Tr. 3, pp. 636, 668.

25. Mr. Sanford began searching for alternate housing approximately two weeks after receiving the eviction notice. His search included the inspection of ten different apartments, nine of which he could not afford. Unable to locate an affordable one-bedroom apartment, around the first of June 1992, he settled on an affordable two-bedroom apartment at 1384 Oakland Boulevard in Walnut Creek, for \$600 a month rent. Tr. 1, pp. 44, 190-93; Tr. 2, pp. 274-76.

26. Immediately prior to leaving the Caprice, eight of Mr. Sanford's friends at the complex cleaned the apartment for him and assisted him in moving. On June 5, 1992, Mr. Maynard inspected Complainants' apartment in the presence of Mr. Sanford and two of his friends. He told Mr. Sanford that everything was satisfactory, and he reflected this conclusion on a "Check-In/Check Out List" by placing checks next to each item. Both Messrs. Maynard and Sanford signed the list indicating their agreement with the inspection. When Mr. Sanford later received a portion of his security deposit from Mr. Maynard in the mail, a substitute list was attached to the check. This substitute list indicated that items were missing, the carpet needed cleaning, the apartment needed painting, and other repairs were necessary. Mr. Maynard had signed his own and Mr. Sanford's name to this list. The check that Mr. Sanford received was in the amount of \$33.15; \$95.85 had been deducted for five days rent and \$171.00 had been deducted for the repairs and maintenance cited on the substitute list. Tr. 1, pp. 194-204; Tr. 3, pp. 621, 669; C. P. Exs. 1H, 2, and 3.

27. Mr. Sanford moved into the Oakland Boulevard apartment on June 5th and still resided there as of the time of the hearing. Even though the apartment was not yet ready for occupancy when he moved in, because the 30-day notice period had elapsed, he had to vacate his home at the Caprice. The Oakland Boulevard apartment was unattractive, unclean, in disrepair, and in a poor location. The bathroom needed to be reconstructed and was not completed until six months later. A few of the windows were inoperable and remained in an open position. Between the open windows and the bathroom reconstruction, the apartment was damp. The blinds had been destroyed by

the previous tenant and the carpet "looked as though motorcycles had been repaired on it without being cleaned." Tr. 1, pp. 193-94, 206, 212-13.

28. The amenities and location at the Oakland Boulevard apartment were much less desirable than those at the Caprice. The appliances and fixtures, such as the dishwasher and kitchen cabinets at the Caprice were in better condition. Although the Oakland Boulevard complex had a pool, it was not heated or cleaned regularly. Tr. 1, pp. 205-07. The Oakland Boulevard complex is located on a main thoroughfare, in an area currently undergoing a freeway expansion, and therefore, it is noisy, dusty, and surrounded by traffic congestion. In addition, loiterers frequent the area immediately outside the complex. Mr. Sanford's new location is not near a shopping area, subway stop, or on a bus route, and consequently, he now drives rather than rely on public transportation. Tr. 1, pp. 207-09; Tr. 3, pp. 707-09. Mr. Guevara was in the hospital when he learned the address of the new apartment. He shook his head "in disgust" over the location of his future residence and inquired whether Mr. Sanford couldn't have found a better location. Tr. 3, p. 702.

29. At the time of the hearing, Mr. Sanford did not know any of his new neighbors. Because most of them do not speak English, he is unable to communicate with them. An apartment in the complex houses five "skinheads," members of an Aryan White supremacist group, who have subjected Mr. Sanford to verbal abuse and harassment. They have kicked his automobile to sound his car alarm and accosted him in the hallway with remarks such as "AIDS kills fags dead" or "I hate faggots." When Mr. Sanford complained to the apartment manager, he was unresponsive and uninterested. Tr. 1, pp. 209-10.

30. In addition to his concern over the poor condition, amenities, and location of the Oakland Boulevard apartment, Mr. Sanford did not relish the idea of moving there because he was upset by the prospect of Mr. Guevara living in less desirable housing than the Caprice. He worried not only about the effect that the sanitation and dampness problems would have on Mr. Guevara's health, but he also regretted that Mr. Guevara would be relocating to less aesthetically pleasing surroundings. Tr. 1, p. 220. Because of his weakened immune system, Complainants and Mr. Guevara's family were concerned that the unfinished bathroom might cause yet more disease and illness. Also, Mr. Guevara was abnormally affected by dampness because his disease constantly made him feel cold. Finally, the toilet from the upstairs apartment leaked into Complainants' apartment causing them additional concern over hygiene. Tr. 1, pp. 212, 216-19; Tr. 3, pp. 703, 707, 720.

31. In an attempt to make the new apartment habitable and attractive for Mr. Guevara's expected return from the hospital, Mr. Sanford replaced the blinds at an expense of \$405.50. In addition, Eric Carroll installed new carpeting at a cost to Mr. Sanford of \$1,900. Mr. Sanford attempted to have the management at the Oakland Boulevard complex replace and pay for the carpeting and blinds. However, he was

informed that the apartment had been rented "as is." Tr. 1, pp. 212-16; C. P. Ex. 5.

32. After his discharge from the hospital on May 19, 1992, Mr. Guevara moved in with his sister, Michelle Giere, in Hercules, California. Mr. Guevara would have preferred to room with Mr. Sanford, however, the health and sanitation problems at the new apartment prevented that initially. Despite Complainants' and Mr. Guevara's family's concerns, Mr. Guevara moved into the Oakland Boulevard apartment around the end of June 1992. Tr. 1, pp. 158-59; Tr. 3, pp. 706-07.

33. Although rest was essential for Mr. Guevara's recovery, he found it increasingly difficult to sleep at the new apartment because of the noise from the neighbors. He rapped his cane on the walls and ceiling in desperation. The construction work on the apartment also disturbed him. Mr. Guevara was, at times, in a wheelchair, and he had to maneuver a few steps for access to the new apartment. Tr. 1, p. 211; Tr. 2, p. 276; Tr. 3, p. 703.

34. Mr. Guevara was unable to sleep at the new apartment because of the noise. In addition, although his sister and a social services "buddy" (a volunteer assigned to homebound HIV patients) would visit occasionally, there were no neighbors to look in on him. Tr. 1, p. 211; Tr. 2, p. 276; Tr. 3, pp. 709-11, 716. Mr. Guevara's mother was not employed outside of her home, and therefore, she could provide full-time care and spend time with her son. Accordingly, in November of 1992, Mr. Guevara moved in with his parents at Vallejo, California. Tr. 3, p. 727. Both Complainants considered this move necessary for his health despite the fact that they did not want to be separated. Tr. 1, pp. 218-19.

35. While Mr. Guevara was at his parents' home, Mr. Sanford did not own a car. Therefore, Mr. Sanford found it difficult to visit Mr. Guevara there. In addition, Mr. Sanford and Mr. Guevara's mother did not get along well. Tr. 1, p. 219; Tr. 3, p. 716. Mr. Sanford stated that "because of the distance factor and everything else considered, for all intents and purposes, it ended [our relationship]." Tr. 1, p. 219. Mr. Sanford lost sleep, began to drink heavily, and became less productive and more introverted at work. Tr. 1, p. 219.

36. Mr. Guevara died on March 21, 1993. Tr. 3, p. 717.

37. Between the second and third week of April 1992, Mr. Sanford had been diagnosed as having the Human Immunodeficiency Virus, or being "HIV positive." Tr. 2, pp. 183, 254.

## **Discussion**

### Government Delay in Bringing this Action

The Act provides that within 100 days after the filing of a complaint alleging a discriminatory housing practice, HUD shall complete an investigation and determine "whether reasonable cause exists to believe that a discriminatory housing practice has occurred. . . unless it is impracticable to do so." 42 U.S.C. §§ 3610 (a)(1)(A)(i), 3610 (a)(1)(B)(iv), and 3610 (g). If HUD is unable either to complete its investigation or make a reasonable cause determination within the 100-day period, HUD shall notify the parties in writing of the reasons. 42 U.S.C. §§ 3610 (a)(1)(C), 3610 (g)(1). Complainants filed their complaint on May 21, 1992. HUD completed the investigative report by February 3, 1993, and issued the charge on October 13, 1993, 258 and 510 days respectively, after the filing of the complaint. The Charging Party failed to notify Respondents of any reason for the delays.

Respondents contend in their pre-hearing brief that HUD's failure to meet the 100-day deadline or to provide written notification of the reason for the delay constitutes a bar to this action. Respondents' Trial Brief (Feb. 1, 1994) at 11-12.<sup>11</sup> HUD counters that the delay was reasonable in light of Respondents' dilatory tactics.<sup>12</sup> Charging Party's Brief at 42. Neither party, however, addresses whether Respondents suffered any prejudice because of HUD's actions.

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<sup>11</sup>The case cited by Respondents as support for their assertion, *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971), has been criticized. See *Young v. AAA Realty Co. of Greensboro, Inc.*, 350 F. Supp. 1382, 1385-86 (M.D. N.C. 1971); see also *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 966 (N.D. Tex. 1993).

<sup>12</sup>The Charging Party was unable initially to serve subpoenas on the Burnses. In addition, HUD had to make several attempts to contact Mr. Maynard to schedule an interview. Tr. 2, p. 391; C.P. Ex. 18, Tab I.

Because Respondents have neither alleged nor demonstrated that their defense of this action was prejudiced by late service of the investigative report, a delayed reasonable cause determination, or lack of notification of the reasons for the delays, the statutory time limits do not bar this action. See *United States v. Beethoven Assocs. Ltd. Partnership*, 843 F. Supp. 1257, 1264 (N.D. Ill. 1994); *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 966 (N.D. Tex. 1993); *United States v. Curlee*, 792 F. Supp. 699 (C.D. Cal. 1992). But see *United States v. Aspen Square Management Co., Inc.*, 817 F. Supp. 707 (N.D. Ill. 1993), *vacated by settlement* ("limitation periods are ultimately established to cut off rights, justifiable or not") (citation omitted). Nevertheless, HUD's failure to meet the statutory requirements is relevant to any assessment of civil penalties. *Kelly v. HUD*, 3 F.3d 951 (6th Cir. 1993);<sup>13</sup> *Baumgardner v. HUD*, 960 F.2d 572 (6th Cir. 1992).

### Governing Legal Framework

Under the Fair Housing Act it is illegal to "discriminate in the . . . rental, or to otherwise make unavailable or deny, a dwelling to any. . . renter because of a handicap of. . . that. . . renter,. . . or. . . any person associated with that. . . renter." 42 U.S.C. § 3604(f)(1). "Handicap" is defined as "a physical. . . impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602 (h)(1). It includes the Acquired Immune Deficiency Syndrome ("AIDS") and the Human Immunodeficiency Virus ("HIV positive"). *Stewart B. McKinney Foundation v. Town of Fairfield*, 790 F. Supp. 1197, 1209-10 (D. Conn. 1992); *A.F.A.P.S. v. Regulations & Permits Admin.*, 740 F. Supp. 95, 103 (D. P.R. 1990); *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720, 729-30 (S.D. Ill. 1989); 24 C.F.R. §§ 100.20, 100.201; see House Judiciary Comm., *Fair Housing Amendments Act of 1988*, H.R. Rep. No. 711, 100th Cong., 2d Sess. 18, 22 (1988).

As an affirmative defense, Respondents assert that even if Mr. Maynard discriminated, his alleged discriminatory actions cannot be imputed to them. The doctrine of *respondeat superior* generally holds a principal liable for an agent's actions provided that those actions are within the scope of the agent's authority. See 3 *C.J.S. Agency* §§ 390 and 391 (1973); *Restatement (Second) of Agency* § 219 (1958). This legal principle is applicable to Title VIII because the duty not to discriminate is nondelegable. See *Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086

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<sup>13</sup>The United States Court of Appeals for the Sixth Circuit in *Kelly* stated that HUD's delays increased complainant's damages claim and that damages should not be "assessed for the period during which HUD completely neglected this case." 3 F.3d at 958. While HUD's delays in this case are relevant in assessing a civil penalty, I do not decrease Complainants' compensatory damages because to do so would unfairly penalize Complainants for those delays.

(7th Cir. 1992), *cert. denied*, 113 S. Ct. 2961 (1993); *Marr v. Rife*, 503 F.2d 735, 740-41 (6th Cir. 1974); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d. 623 (9th Cir. 1975).

1. HUD has established a prima facie case of discrimination.

To establish a *prima facie* case, HUD must prove that: 1) Mr. Guevara was a "renter" with a "handicap," 2) Mr. Sanford was a "renter" "associated with" a person with a "handicap," 3) Complainants were evicted, and 4) Respondents, their agent, or employee knew or were reasonably expected to know of the "handicap" prior to serving the eviction notice. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973);<sup>14</sup> *HUD v. Dedham Housing Authority*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,015, 25,212 (Nov. 15, 1991).

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<sup>14</sup>The *McDonnell Douglas* test has been employed in determining discrimination under 42 U.S.C. § 3604(a) and (b). Because the relevant language in section 3604(f) is identical to that in (a) and (b), the same test is applicable.

Mr. Guevara was a renter. He moved in with Mr. Sanford in November of 1989 and was later added to the lease. He had a "handicap" because he was afflicted with AIDS. See *supra* p. 12. Mr. Sanford was a renter and he was "associated with" Mr. Guevara by virtue of Complainants' tenancy. See 42 U.S.C. § 3604(f)(1). Complainants were evicted by Respondents. The remaining element of the *prima facie* case is Mr. Maynard's knowledge of Complainant's handicap and when he acquired that information.

Respondents dispute that Mr. Maynard knew of Complainant's illness prior to the eviction. Based on the testimony of two witnesses, I have determined that he acquired this knowledge, on April 30, 1992, while rummaging through Complainants' refuse. See *supra* pp. 6-7 and note 9.

Jose Avila, a former tenant who was evicted after his children came to live with him at the Caprice, testified as follows:

George would go around. . . trying to find a clue where Carlos was, and one day, he came to me and he started. . . shaking and saying I know where Carlos is now, and [I asked] what do you mean, and he said to me, yeah, I seen Warren going to the dumpster, I went to throw my garbage away, I found a letter from Carlos to Warren, and I think he's in the hospital dying of AIDS.

Tr. 2, pp. 449-50. Mr. Avila adamantly testified that "right after he found the letter," Mr. Maynard served the eviction notice.<sup>15</sup> Tr. 2, p. 450, 466-68.

Another tenant, Paul Kearney, testified that on the morning of April 30th, he went to the dumpster to dispose of his trash. He saw Mr. Maynard "reading a piece of yellow paper which he had dug out of the garbage." C. P. Ex. 11. Mr. Kearney heard Mr. Maynard state that "he now knew where Carlos Guevara had been for the last two weeks." Tr. 2, pp. 312-14; C.P. Ex. 11. Based on the similarity of their testimony, I concluded that both Mr. Avila and Mr. Kearney were testifying about the same incident. Mr. Kearney observed Mr. Maynard immediately after he found the letter, and Mr. Avila

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<sup>15</sup> Respondents challenge Mr. Avila's credibility, alleging that he was biased against Respondents because of the circumstances of his own subsequent eviction which occurred after his children came to live with him. Having observed this witness, I did not become aware of any particular hostility towards Respondents that would cause him to fabricate his testimony. In addition, I credit his testimony that the Caprice was too small for his family and that he needed to find a larger apartment in any event. Receiving the 30-day notice provided him with the "push" to find acceptable housing. Tr. 2, pp. 444-45. Respondents further contend that because Mr. Avila conceded that he was unable to remember dates, he could not be certain whether this encounter with Mr. Maynard occurred before or after the eviction notice. Again, I disagree. Even though he may not have known the precise date, he was confident that the incident occurred *immediately prior* to service of the 30-day notice. Further, his testimony is corroborated by that of another tenant, Paul Kearney. Accordingly, I conclude that Mr. Maynard found the letter on April 30, 1992.

encountered him a short time thereafter. Therefore, one day prior to serving the eviction notice, Mr. Maynard discovered that Mr. Guevara had AIDS. The Charging Party has shown all four prongs of a *prima facie* case, thus fulfilling its initial burden.

## 2. Respondents' articulated reasons are pretextual.

Respondents have met their burden of production by articulating nondiscriminatory reasons for the eviction. Mr. Burns testified that Complainants engaged in conduct that was "a cumulative case of breach of rules and regulations." Tr. 3, p. 793. Specifically, Respondents allege that: 1) Complainants disturbed other tenants with loud noise and music late at night from their apartment, and loud music at the pool; 2) Complainants constantly had numerous guests in their apartment, thus turning it into a "community center;" 3) sometime in 1991, one of Complainants' guests tore a screen off a window and kicked out a light; 4) Mr. Sanford had overnight guests, including Mr. Guevara, without management's permission; 5) Complainants continually jumped in the pool, and Mr. Sanford's bleached hair neutralized the chlorine; 6) Complainants did not recycle; and 7) Complainants were "uncooperative and defiant."<sup>16</sup> I find, however, that all of Respondents' reasons are pretextual. Because the most recent alleged incident of misconduct occurred at least a year before the eviction, see Tr. 2, p. 398, C. P. Ex. 17, I conclude that none of these incidents was viewed as sufficiently serious by Respondents to warrant eviction at the time of the incidents and that Respondents were unable to demonstrate any subsequent misconduct which could have warranted eviction.

Respondents contend that Complainants disturbed other tenants with loud noise and music late at night from their apartment and loud music at the pool. I find that neither Complainants' dinner parties nor their music at the pool was unduly disruptive to the complex because numerous current and former tenants credibly testified that they were not. Tr. 2, pp. 296, 311, 332, 457-58; Tr. 3, pp. 662-63. Moreover, Mr. Maynard did not complain about other tenants who had parties or played music poolside at least as loud as Complainants. Tr. 2, pp. 333-35, 457-59; Tr. 3, pp. 662-63. He would have done so if noise were truly a concern. In addition, Mr. Maynard, himself, attended some of the "wild pool parties" that lasted much later than Complainants' dinner parties. His participation at these parties indicates either that he did not consider the parties to violate the rules or that he exonerated participants of any culpability in such violations.

Further, Respondents' evidence that Complainants disturbed other tenants is not persuasive. Respondents rely on testimony from Larry Rhodes, Mr. Maynard's close

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<sup>16</sup>I have considered reasons proffered by Respondents from various sources, including Mr. Maynard's interview with the HUD investigator; a June 22, 1992, letter to HUD from Respondents' attorney; Respondents' responses to HUD's first set of interrogatories; and Mr. Burns' testimony. See Tr 2, pp. 391-96; Tr. 3, pp. 793-800; C. P. Exs. 9; 10, pp. 6-8; 17; and 18, Tab C1.

friend of 25 years. He testified that Mr. Maynard complained of noise from Complainants' apartment, and he reported to Mr. Rhodes that he told Complainants to

be quiet on numerous occasions. Tr. 1, pp. 96-98, 106, 125, 128. However, because of Mr. Maynard's tendency to ramble and be repetitive, I am unable to determine whether he was repeating a few incidents or describing a number of others. Tr. 1, p. 127; Tr. 2, p. 340; C. P. Ex. 14. Also Mr. Rhodes visited Mr. Maynard one to four times a month at the Caprice from January 1990 until September 1993. During that time he heard loud music from Complainants' apartment only once, during a weekend in 1990, in the late afternoon or early evening. Tr. 1, pp. 96, 116, 121-23.

Finally, Mr. Burns' testimony demonstrates that Respondents' purported concerns over noise are pretextual. He testified that there were "a *few* letters and *things* on file about the different complaints [of noise] from Warren Sanford apartment." Tr. 3, 796 (emphasis added). However, Respondents only produced *one* letter from Complainants' next door neighbor, John Ortland, an unreliable source.<sup>17</sup> Moreover, when questioned if Mr. Maynard informed him about other tenants' complaints of noise from Complainants' apartment, Mr. Burns replied "[t]here was no letter about it, though, so it couldn't have been that important." Tr. 3, p. 799.

Respondents characterized Complainants' apartment as a "community center." However, Respondents were unable to articulate any infraction which Complainants engaged in by having visitors. Although they alleged that sometime in 1991, one of Complainants' guests damaged a screen and light, Respondents offered no more than unsubstantiated allegations concerning the alleged incident. See C. P. Exs. 17 and 18.

Respondents allege that Complainants had unauthorized overnight guests, one of whom was Complainant Guevara. He did, however, sign a lease with Respondents, making him an "authorized tenant." Complainants had one overnight guest of which management was aware. However, the guest was there for only a short period of time, approximately a week, and Complainants told the guest to leave immediately after Mr. Maynard complained. Respondents complain of Mr. Sanford jumping in the pool and neutralizing the chlorine level. However, other tenants jumped in the pool and another tenant with bleached hair swam in the pool, all without reproach. None of these alleged infractions was considered sufficiently serious by Respondents to warrant documentation.

Respondents contend that Complainants' failure to recycle was a reason for the eviction. I disagree. Because recycling was a voluntary program, Mr. Maynard was not searching for evidence concerning recycling habits when he inspected Complainants'

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<sup>17</sup>Mr. Ortland wrote to Mr. Maynard concerning the "problem noise" from Complainants' apartment. R. Ex. J. Respondents, however, evicted Mr. Ortland because he had a drinking problem and used to bother other tenants. Tr. 1, p. 120.

garbage, but rather, information concerning Mr. Guevara's whereabouts and medical condition. In addition, if he were looking for evidence concerning recycling habits, he would have had no need to read personal notes. Finally, the testimony of various witnesses demonstrates that Mr. Maynard was particularly curious concerning Mr. Guevara's whereabouts. Tr. 2, pp. 329, 449-50, 480, 485-86, 505-06; Tr. 3, p. 790. Accordingly, I conclude that Respondents' purported concern over recycling was their after-the-fact justification to explain why Mr. Maynard read Complainants' personal note and rummaged through their refuse.

Respondents allege that Mr. Sanford's "defiance," as manifested by his inquiry concerning recycling, ultimately necessitated the eviction. Mr. Burns testified that immediately after Mr. Maynard informed him about Mr. Sanford's inquiry, Mr. Burns felt compelled to serve the eviction notice. As he put it, he felt that Mr. Sanford had become "belligerent. . . a little too uncooperative and a little bit defiant." Tr. 3, p. 795. "[T]here was nothing we could do anymore. . . . [I]t was time for the 30 day notice." Tr. 3, p. 800. Although Mr. Burns testified that Mr. Sanford's inquiry prompted his decision to evict Complainants, it was not listed in the letter that Respondents' attorney sent to HUD cataloguing Complainants' alleged infractions. See C. P. Ex. 18, Tab C1. More telling is Mr. Maynard's interview with the HUD investigator. Although Mr. Sanford's so-called "defiance" was the event alleged to have triggered the eviction, Mr. Maynard did not mention this to the HUD investigator as one of the reasons for the eviction. The investigator specifically asked Mr. Maynard, several times, if there was any particular incident immediately prior to the eviction that prompted service of the 30-day notice, and Mr. Maynard replied that the problems were "on-going." He never once mentioned Mr. Sanford's alleged defiance or inquiry concerning recycling. Tr. 2, pp. 398, 413-15; C. P. 17. Therefore, I conclude that Mr. Burns's articulated reason that purportedly triggered the eviction action was no more than another after-the-fact justification for the eviction action.

### 3. HUD has demonstrated an intent to discriminate.

While I infer intentional discrimination from the pretextual reasons asserted by Respondents, as well as from the showing of a *prima facie* case, I also find that other evidence of intent exists. See *St. Mary's Honor Center*, 113 S. Ct. 2742; 125 L. Ed. 2d 407 (1993). With the exception of Mr. Sanford's "defiant attitude," Respondents' other asserted reasons for eviction are alleged breaches of rules and regulations. However, three of the six alleged improprieties did not violate any rules or regulations. There was no prohibition against swimming with bleached hair, no limit on the number of daytime visitors, and no requirement to recycle. Furthermore, I do not believe that Mr. Maynard was as concerned with strict compliance with the rules and regulations as Respondents assert because he himself was a prime offender of the complex's rules by his attendance at the late night pool parties and consumption of alcoholic beverages at those parties.

In addition, the record contains other evidence of intent. First, the timing of events is probative of an intent to discriminate. Although none of Complainants' alleged

misconduct took place within the year preceding the eviction notice, the notice was served one day after Mr. Maynard ascertained Mr. Guevara's medical condition. Tr. 2, pp. 397-98, Tr. 3, pp. 605, 793, 823; C. P. Ex. 17. The timing is particularly suspect because although Mr. Maynard liked Mr. Guevara, he suddenly took steps to evict him after discovering his illness. There is no other probable explanation for Mr. Maynard's changed attitude, except for Mr. Guevara's illness.

Second, Mr. Burns did not follow his normal procedures in serving the eviction notice. Ordinarily, tenants were given two written warnings prior to an eviction notice. Complainants, however, had never been threatened with or warned about eviction. Rather, Complainants' reaction to the eviction notice included shock and disbelief because they had no reason to expect such an action from Respondents.

Finally, I also find intent based on a comment that Mr. Maynard made to Mr. Avila's wife, Jeannette. He informed Ms. Avila that he had evicted Complainants because "he couldn't have anybody laying around here dying." Tr. 2, pp. 480-81, 500. Respondents dispute the relevance of this statement because Ms. Avila did not testify that the statement was made prior to the eviction. The timing is of no import, however. The statement indicates that the true reason for the eviction was Mr. Guevara's fatal illness, AIDS.<sup>18</sup>

4. Respondents are liable for the discrimination against Complainants.

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<sup>18</sup>Respondents alleged at the hearing that they did not discriminate against individuals with AIDS because there was another Caprice tenant, David, who was homosexual and also died of AIDS. He was hospitalized sometime in 1991. Tr. 3, pp. 683-89. However, Mr. Maynard had no knowledge concerning David's homosexuality or his disease. He informed the HUD investigator in August of 1992 that other than Complainants, there were no "gay, disabled or other residents with HIV." C. P. Ex. 17, p. 9.

Respondents contend that even if Mr. Maynard discriminated against Complainants, his actions cannot be imputed to Respondents under the doctrine of *respondeat superior* because Mr. Burns, not Mr. Maynard, made the decision to serve the 30-day notice. Respondents argue that because Mr. Maynard did not have authority to evict Complainants without Mr. Burns' approval, taking the eviction action was not within Mr. Maynard's scope of employment, and Respondents cannot be held liable under *respondeat superior*. Respondents also assert that because the Burns did not intend to discriminate or have knowledge of Complainant's handicap, they cannot be held liable for Mr. Maynard's actions.

Although Mr. Burns made the ultimate decision to evict, I find that he would not have done so but for the advice of Mr. Maynard. Mr. Burns relied upon Mr. Maynard to inform him about the condition of the Caprice and any problems with the tenants. He visited the Caprice only to collect rent checks and discuss any issues that Mr. Maynard raised. When Mr. Maynard provided his recommendation to evict Complainants, he was clearly acting within the scope of his employment. Accordingly, Respondents are liable for his conduct. See, e.g., *United States v. Youritan Constr. Co.*, 370 F. Supp. at 649; see also 3 C.J.S. Agency §§ 390 and 391; *Restatement (Second) of Agency* § 219.

Respondents argue that their lack of intent and lack of knowledge insulate them from liability. On the contrary, Respondents cannot shield themselves from liability by asserting that either they did not practice discrimination themselves or that they were ignorant of the relevant facts. This argument fails because the duty not to discriminate is nondelegable. See, e.g., *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992); *Matchmaker Real Estate Sales Center*, 982 F.2d at 1096-97; *Sanders v. Dorris*, 873 F.2d 938, 944 (6th Cir. 1989); *Marr v. Rife*, 503 F.2d at 740-41. Accordingly, Respondents violated 42 U.S.C. § 3604 (f) and 24 C.F.R. §§ 100.50(b)(3) and 100.202(a).

## Remedies

Having found that Respondents are liable for discriminatory housing practices, Complainants are entitled to "such relief as may be appropriate, which may include actual damages. . . and injunctive and other equitable relief." 42 U.S.C. § 3612(g)(3). "[T]o vindicate the public interest," Respondents also may be assessed a civil penalty. *Id.* The Charging Party seeks \$3,043.34 in out-of-pocket expenses for Mr. Sanford; \$10,000 for each Complainant for "inconvenience;"<sup>19</sup> \$55,000 for Complainant's estate and

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<sup>19</sup>Damages for "inconvenience" and "lost housing opportunity" are awarded as compensation for intangible losses resulting from the stress associated with finding new housing, litigation, and the loss of more desirable housing. Because these damages are intangible, I consider them together with the other claimed damages for emotional distress. See Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 The John Marshall Law Review 1 (1992).

The Charging Party also seeks \$5,000 for each Complainant for "loss of civil rights." Because the damages claimed for "loss of civil rights" are duplicative of other damages asserted, they are not

\$75,000 for Mr. Sanford for emotional distress; and assessment of a \$10,000 civil penalty against each Respondent.

### Economic Damages

Complainant Sanford is entitled to compensation for any out-of-pocket expenses caused by the discriminatory eviction. See *Thronson v. Meisels*, 800 F.2d 136, 140 (7th Cir. 1986). Complainant's rent at the one-bedroom Caprice apartment was \$575 a month; the rent at the two-bedroom Oakland Boulevard apartment was \$600 a month. The Charging Party seeks the rent differential for a 20 month period, from the date of the eviction, June 6, 1992, until the hearing date, February 1, 1994.<sup>20</sup> Respondents speculate that an additional bedroom was of value to Complainant. That speculation is not supported by the record. In view of Complainant's preference for a less expensive apartment, I conclude that he is entitled to the rent differential. In seeking compensation for the 20 month period, HUD failed to account for Mr. Guevara's contribution to the rental payment. Mr. Sanford testified that Mr. Guevara paid a portion of the rent and utilities while they resided together after Mr. Guevara's hospitalization, approximately five months. Because the portion that each Complainant paid is not in evidence, I allocate 50% of the rent differential during that five month period to Mr. Sanford. Accordingly, Mr. Sanford is entitled to \$375 ( $\$25 \times 15$ ) for the 15 month period, and \$62.50 ( $(\$25 \times 5)/2$ ) for the five month period for the rent differential.<sup>21</sup>

Mr. Sanford is entitled to recover \$1900 for new carpeting and \$405.50 for new window treatments at the Oakland Boulevard apartment. Both expenses were incurred to make the alternate housing habitable - an action Complainant would not have taken were it not for his eviction from the Caprice. Mr. Sanford is also entitled to \$171.00 for the expenses inappropriately deducted by Mr. Maynard from his security deposit.

Finally, Respondents must reimburse Complainant \$141.75 for costs incurred in installing the custom window treatments at the Caprice, in anticipation of Mr. Guevara's return home. But for Respondents' discriminatory eviction, Complainant would have had the use and enjoyment of the improvements that he made to the Caprice, and accordingly, he should be reimbursed by Respondents for that use and enjoyment.

### Inconvenience, Lost Housing Opportunity and Emotional Distress

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compensable. See *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986); *Carey v. Phipps*, 435 U.S. 247 (1978); *Baumgardner*, 960 F.2d at 583.

<sup>20</sup>The Charging Party miscounted this 20 month period as a 17 month period and mistakenly asked only for \$425 instead of \$500.

<sup>21</sup>Because the Charging Party did not seek a rent differential for Mr. Guevara, I do not award one.

When informed of the eviction, Mr. Guevara became agitated. He required more oxygen, had difficulty sleeping, and became depressed. He was also incredulous. Complainants had meticulously maintained their apartment and paid their rent on time. He could not understand why they were being evicted. Assuming initially that Mr. Sanford must have done something to cause the eviction, Mr. Guevara soon correctly surmised that the true reason for the eviction was his affliction with AIDS. He became incensed. The little energy that he had was diverted into formulating a strategy for contesting the eviction. His anger and distress over the reason for the eviction strained his relationship with Mr. Sanford. Already suffering from a debilitating, invariably fatal disease, he also faced the loss of his home, friends, and the few comforts of the life remaining to him. The eviction transformed him into someone who "had lost all of his bearings. . . ." Tr. 3, p. 702.

Mr. Sanford was also angry and distraught over the eviction. He wept and was depressed for months. In addition to the anxiety of locating a new home in a short period of time, he had to cope with the stress of locating acceptable housing conducive to Mr. Guevara's convalescence. Mr. Sanford was concerned with finding an apartment that would not further impair Mr. Guevara's health and would also provide aesthetically pleasing environs.<sup>22</sup> The Oakland Boulevard apartment would do neither.

Complainants had to abandon their comfortable, clean home at the Caprice for an apartment that was unattractive, dirty, and in disrepair. It had few amenities and was located in an unattractive, noisy neighborhood. The bathroom needed repair and the carpet and window treatments needed replacement. Complainants were concerned about the effect on Mr. Guevara's health of the inoperable windows, the dampness, the unfinished bathroom, and the leaking bathroom in the apartment above. Because of these potential health and sanitation problems,<sup>23</sup> Mr. Guevara was unable to move in with Mr. Sanford upon his release from the hospital. He had to move in with his sister, enduring a two month separation from his domestic partner,<sup>24</sup> from May until the end of June 1992.<sup>25</sup>

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<sup>22</sup>While Mr. Sanford began to drink, lost sleep, and became unproductive at work, the record reflects that his morbidity was due, at least in part, to Mr. Guevara's illness and Mr. Sanford's own HIV diagnosis. Tr. 1, pp. 219-20. Accordingly, because his afflictions were not necessarily attributable to Respondents, Complainant cannot be compensated for them.

<sup>23</sup>Respondents assert that they are not responsible for the initial condition of the Oakland Boulevard apartment. However, that apartment was their only affordable alternative.

<sup>24</sup>I credit Mr. Sanford's testimony that their emotional dependency could indeed be likened to a successful marriage. See Tr. 1, p. 45.

<sup>25</sup>Respondents argue that Mr. Guevara never expected to live with Mr. Sanford after his initial hospitalization. They base this on a discharge summary compiled by the hospital on May 7, 1992, which states that:

During much of their tenancy, ongoing repairs and noise impeded Mr. Guevara's convalescence. Because of the noise level, he was unable to sleep, rapping his cane on the ceiling and walls in despair. Because he was at times confined to a wheelchair, the steps at the entrance to the apartment presented yet another obstacle.

The new apartment was not convenient to public transportation. It was not as close to the worksites of Mr. Sanford, Ms. Burlison, and Mr. Carroll, all three of whom were willing and would have been able to assist in caring for Mr. Guevara had he remained at the Caprice. Complainants lost the assistance and emotional support of neighbors at the Caprice who were also their friends. At the Oakland Boulevard apartment, Mr. Sanford could not communicate with his non-English speaking neighbors. In addition, Mr. Sanford was confronted with "skinhead" neighbors who hurled anti-gay epithets.

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The patient seemed to understand his predicament and the fact that it was likely he would not survive this hospitalization. He expressed a strong desire to be transferred to [the medical facility] Vallejo Kaiser. His family lived in that area and *he had recently been evicted from his apartment in Walnut Creek*. The Social Worker consulted and felt that this was of great benefit to the patient.

C. P. Ex. 13, numbered pp. 2-3 (emphasis added). Obviously, given that the summary was prepared prior to Mr. Sanford's acquiring alternative housing, Mr. Guevara saw no other choice than to move in with his parents.

In November of 1992, Mr. Guevara moved in with his parents in Vallejo. Contrary to Respondents' assertion, the record does not establish that he would have had to relocate to his parents' home had he remained at the Caprice. The evidence clearly shows that the unsatisfactory conditions at the Oakland Boulevard apartment motivated his family to relocate him to Vallejo. Tr. 3, pp. 709-11, 727.

Distress over the eviction pervaded the last months of Mr. Guevara's life. The pleasures and comforts of life at the Caprice were irretrievably lost to him. His forced relocation caused anxiety over his health and sanitation, and left him a lonely, painful existence without friends, neighbors, and familiar surroundings. For his emotional distress during the period from May 1, 1992 until his death in March 21, 1993, I award the Estate of Carlos Guevara \$50,000.

Mr. Sanford also lost the opportunity to live at the Caprice with Mr. Guevara during his last days. Instead he was forced to worry about what effect the conditions at the Oakland Boulevard apartment would have on Mr. Guevara's health. Mr. Sanford also endured those same discomforts, disturbances, and inconveniences at the Oakland Boulevard apartment. For his emotional distress, I award Mr. Sanford \$30,000 for the period May 1, 1992, until the date of the hearing.

#### Civil Penalties

The Charging Party requests that a \$10,000 civil penalty be awarded against each Respondent: the Trust, Mr. Burns, and Mrs. Burns. Respondents reply that penalties are inappropriate because Respondents had no knowledge of the discrimination nor did they intend to discriminate.

Assessment of a civil penalty is not automatic. See H. Rep. No. 711 at 37. In determining whether to assess a penalty and the amount involved, the following factors must be considered: the nature and circumstances of the violation, the degree of culpability, the goal of deterrence, whether there has been a previous unlawful discrimination practice, the financial circumstances of the respondent, and other matters as justice may require. *Id.*

##### 1. Nature and Circumstances of the Violation and Degree of Culpability

Although the Charging Party did not prove that Respondents had actual knowledge of Mr. Guevara's illness prior to the eviction, Respondents' conduct is not totally blameless. Mr. Burns made the decision to evict, blindly relying upon the recommendations of his manager, without prior inquiry or investigation. Respondents' concerns were limited to whether Mr. Maynard delivered the rent checks on time and whether he maintained the physical condition of the property. They did not focus on the reasons for or the effects of their manager's actions. Had they done so, this case would not have arisen. Moreover, I conclude that Mr. Burns' articulated reasons for the eviction

are false. See *supra* pp. 14-16.

## 2. Deterrence

Under the circumstances of this case the goal of deterrence will be furthered by an award of a civil penalty. Owners must be put on notice that blind ratification of discriminatory actions and false after-the-fact justifications of those actions will not be tolerated.

## 3. Respondents' Record

There is no evidence that Respondents previously have been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against Respondents is \$10,000, pursuant to 42 U.S.C. § 3612 (g)(3)(A) and 24 C.F.R. § 104.910(b)(3)(i)(A).

## 4. Respondents' Financial Circumstances

Evidence regarding Respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of introducing such evidence into the record. If they fail to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of financial circumstances. See *Campbell v. United States*, 365 U.S. 85, 96 (1961); *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶¶ 25,001, 25,015 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990). The record does not contain any evidence indicating that Respondents could not pay a civil penalty without suffering undue hardship.

## 5. Other Factors

In addition to these factors, I have also considered the following. First, Mr. Burns instructs his managers not to discriminate. Second, HUD failed to notify the parties of any reasons for the delays, a statutory requirement. After consideration of all factors, I award a \$1,500 civil penalty against Respondents jointly and severally.

## Injunctive Relief

Injunctive relief is required to ensure that future violations do not occur. See *Blackwell*, 2 Fair Housing-Fair Lending at 25,014. The relief is to be molded to the specific facts of this case. The Order set forth below provides the appropriate injunctive relief.

## **ORDER**

It is hereby ORDERED that:

1. Respondents The Elroy R. and Dorothy Burns Trust, Elroy R. Burns, and Dorothy Burns are permanently enjoined from discriminating with respect to housing. Prohibited actions include, but are not limited to:

a. refusing or failing to rent a dwelling, or refusing to negotiate for the rental of a dwelling, to any person because of handicap, including any person with the Acquired Immune Deficiency Syndrome or the Human Immunodeficiency Virus;

b. otherwise making unavailable or denying a dwelling to any person because of handicap, including any person with the Acquired Immune Deficiency Syndrome or the Human Immunodeficiency Virus; and

c. coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Fair Housing Act.

2. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster alongside any "for rent" signs posted in connection with any dwellings that they own, manage, or otherwise operate, as of the date of this Order and subsequent to the entry of this Order.

3. Respondents shall institute internal record-keeping procedures, with respect to any operation owned by and any other real property acquired by Respondents that are adequate to comply with the requirements set forth in this Order. These will include keeping all records described in paragraph 4 of this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Representatives of HUD shall endeavor to minimize any inconvenience to Respondents occasioned by the inspection of such records.

4. On the last day of every third period beginning 30 days after this decision becomes final (or four times during the year) and continuing for three years from the date this Order becomes final, Respondents shall submit reports containing the following information to HUD's Pacific/Hawaii Regional Office of Fair Housing and Equal Opportunity, 450 Golden Gate Avenue, P.O. Box 36003, San Francisco, California 94102-3348, provided that the director of that office may modify this paragraph of this Order as he or she deems necessary to make its requirements less, but not more, burdensome:

a. a duplicate of every written application, and a log of all persons who applied for occupancy at any of the properties owned, operated, managed, or otherwise controlled in whole or in part by Respondents, indicating the name and

address of each applicant, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and, if rejected, the reason for such rejection. Respondents shall maintain the originals of all applications described.

b. a list of vacancies at the at any of the properties owned, operated, managed, or otherwise controlled in whole or in part by Respondents during the reporting period, including: the address of the unit, the date the tenant gave notice of an intent to move out or was served with an eviction notice, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in. When a tenant has been evicted, Respondents shall state the reason for the eviction.

c. a list of all people who inquired, in writing, in person, or by telephone, about renting an apartment, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

5. Within forty-five (45) days of the date on which this Order becomes final, Respondents shall pay the following damages: \$3,055.75 for out-of-pocket expenses to Complainant Warren Sanford; \$30,000.00 for inconvenience, lost housing opportunity, and emotional distress to Complainant Sanford; and \$50,000 for inconvenience, lost housing opportunity, and emotional distress to the Estate of Carlos Guevara.

6. Within forty-five (45) days of the date on which this Order becomes final, Respondents shall pay a civil penalty of \$1,500 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612 (g)(3) and 24 C.F.R. § 104.910, and will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

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WILLIAM C. CREGAR  
Administrative Law Judge

Dated: June 17, 1994.



